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CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1927.

No. 479

HUGH W. GRANT, Receiver of the Struthers Furnace Company,
Petitioner,

vs.

A. B. LEACH & CO., INC.,
Respondent.

RESPONDENT'S SUPPLEMENTAL BRIEF.

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BUNTHORP-WARREN PRINTING COMPANY, CHICAGO.

SUBJECT INDEX.

Page

POINT I. The petitioner is estopped to question jurisdiction of Circuit Court of Appeals..... 7-11

POINT II. The Court of Common Pleas was without jurisdiction to appoint a receiver for property not covered by the mortgage..... 12-34

The jurisdiction of Court of Common Pleas must rest upon foreclosure proceedings, since said Court was without jurisdiction of subject-matter of Baldwin Suit.. 12

Analysis of Petition in foreclosure proceedings 12-15

First cause of action..... 12-13

Second cause of action..... 13-15

The alleged claim against Leach & Co. is not covered by the mortgage..... 15-18

The order directing Grant to sue Leach & Co. is void 18-21

"Jurisdiction," the meaning of..... 22

The orders complained of are not responsive to the pleadings..... 21-35

POINT III. The Court of Common Pleas was without jurisdiction to appoint a receiver for any property of The Struthers Furnace Co., whether said property was covered by the mortgage or not 35-45

Provisions of Ohio Code conferring power to appoint receivers 35

Grant's appointment was contrary to Statute 36-38

A private agreement cannot confer jurisdiction contrary to Statute..... 37-38

When a Court transcends power granted by Statute its action is void..... 37-45

Contrary to the decisions of the Supreme Court of Ohio, Grant's appointment as receiver was without notice and was not responsive to the pleadings; consequently the order of appointment is void 42-44

POINTS AND AUTHORITIES..... 2-6

TABLE OF CASES.

	Page
Alabama Nat. Bank v. Mary Lee Coal & Railway Co., (Ala.) 19 So. 404	18
Baker v. Varney, (Cal.) 62 Pac. 100	37
Banking House of Castetter v. Dukes, (Nebr.) 97 N. W. 805	33
Bigelow v. Forrest, 9 Wall. 339	40-1
Bloomfield R. Co. v. Grace (Ind.) 13 N. E. 680	9
Central Trust Co. v. Worcester Cycle Mfg. Co., 114 Fed. 659	18
Charles v. White (Mo.) 112 S. W. 545, 21 L. R. A. (N. S.) 481	33
Couper v. Shirely (C. C. A. 9th Cir.) 75 Fed. 168	37
Culver v. Rodgers, 33 O. S. 537	16
Cuykendall v. Corning, 88 N. Y. 129, 139	37
Dickerman v. Northern Trust Co., 176 U. S. 181, 194	21
Gennes v. Peterson, (Ore.) 103 Pac. 515	17
Glass Co. v. Stoehr, 54 O. S. 157	16
Hatch v. Ferguson, (C. C. A. 9th Cir.) 68 Fed. 43	41
Jarvis v. McQuaide, 53 N. Y. S. 97	37
Jones Company v. Munger Improved Cotton Mach. Mfg. Co., (C. C. A. 5th Cir.) 50 Fed. 785	9
Kilbourn v. Thompson, 103 U. S. 168, 197-8	22
Murray v. American Surety Co., (C. C. A. 9th Cir.) 70 Fed. 341	37
Ober v. Excelsior Planting & Mfg. Co., (La.) 10 So. 792	43
People v. Wrigley, 155 Ill. 401, 40 N. E. 300	37
Railway Co. v. Jewett, 37 Ohio St. 649	43
Reynolds v. Stockton, 140 U. S. 254	26
Riggs v. Commercial Mutual Ins. Co., (N. Y.) 10 L. R. A. 684	9
Russell v. Shurtleff, (Colo.) 65 Pac. 27	38

Sache v. Gillette, (Minn.) 112 N. W. 386, 11 L. R. A. (N. S.) 803, 807 23
Seamster v. Blackstock, (Va.) 2 S. E. 36 33
Smith v. McCullough, 104 U. S. 25 18
Spoors v. Coen, 44 Ohio St. 497, 9 N. E. 132 33
Staples v. May, (Cal.) 25 Pac. 346, 348 18
State of Florida v. Jacksonville, P. & M. R. Co., 15 Fla. 201, 280-2 18
St. Louis, A. T. R. Co. v. Whitaker, (Tex.) 55 S. W. 448, 451 18

Tyler v. Hamilton, 62 Fed. 187, 189 19
United States v. Walker, 109 U. S. 258 40

Wilcox v. Jackson, 13 Pet. 498, 511 41
Windsor v. McVeigh, 93 U. S. 274 ..... 24, 41

TEXT BOOKS CITED.

Page
21 Corpus Juris, p. 679 16
42 Corpus Juris, p. 127 17
31 Cyc., p. 110 16
Jones on Mortgages (8th ed.) § 1948 36
15 Ruling Case Law, p. 841 22
19 Ruling Case Law, p. 525 17
19 Ruling Case Law, p. 536 17

SECTIONS OF OHIO CODE.

§ 11279, 2 Page's Ohio Code Annot. 42
§ 11283, 2 Page's Ohio Code Annot. 42
§ 11894, 2 Page's Ohio Code Annot. 35

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vs.

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Respondent.

RESPONDENT'S SUPPLEMENTAL BRIEF.

MAY IT PLEASE THE COURT:

The respondent wishes to supplement the brief that was filed by it in opposition to the petition for a writ of certiorari.

The present brief will be addressed to certain phases of the law of Collateral Attack. In it we shall endeavor to demonstrate that the Circuit Court of Appeals correctly held that the Court of Common Pleas of Mahoning County did not and could not confer upon Grant, as receiver, power to maintain the suit that was subsequently instituted by him against A. B. Leach & Co., Inc.

The propositions and authorities upon which we rely are as follows:

POINTS AND AUTHORITIES.

I.

Petitioner is estopped to assert here that the Circuit Court of Appeals was without jurisdiction to determine whether the Court of Common Pleas had conferred or could confer upon Grant power to sue Leach & Co.

Jones Company v. *Munger Improved Cotton Mach. Mfg. Co.* (C. C. A. 5th Cir.) 50 Fed. 785.

Bloomfield R. Co. v. *Grace,* 112 Ind. 128, 13 N. E. 680.

Biggs v. *Commercial Mutual Ins. Co.* 125 N. Y. 7, 25 N. E. 1058, 10 L. R. A. 684.

II.

The Court of Common Pleas neither conferred nor could confer authority upon Grant to sue Leach & Co. for the following reasons:

1. **The petition to foreclose plainly shows that the mortgage did not cover the alleged claim against Leach & Co. It is true that petitioner prayed that a receiver be appointed for all the property of The Struthers Furnace Co., but this prayer was no part of petitioner's cause of action, and could not authorize any relief not warranted by the facts pleaded.**

2. **"Jurisdiction" means the power to hear and determine an issue presented by the pleadings.**

3. **The order appointing Grant receiver for property not covered by the mortgage, viz., the alleged claim against Leach & Co., and the order directing that suit be brought on said claim were not responsive to the pleadings. Consequently both orders were void.**

That the prayer is no part of the cause of action and

cannot authorize relief not warranted by the facts pleaded, see:

Glass Co. v. *Stoehr,* 54 O. S. 157.
Culver v. *Rodgers,* 33 O. S. 537.
21 Corpus Juris, p. 679.
31 Cyc. p. 110.

With respect to the purpose and scope of foreclosure proceedings, see the following:

Gennes v. *Peterson* (Ore.) 103 Pac. 515.
19 Ruling Case Law, pp. 525, 536.

That an order appointing a receiver for property not covered by the mortgage is void, see:

Staples v. *May,* (Cal.) 25 Pac. 346, 348.
Alabama Nat. Bank v. *Mary Lee Coal & Railway Co.,* (Ala.) 19 So. 404.
St. Louis, A. T. R. Co. v. *Whitaker,* (Tex.) 55 S. W. 448, 451.
Central Trust Co. v. *Worcester Cycle Mfg. Co.,* 114 Fed. 659.
State of Florida v. *Jacksonville, P. & M. R. Co.,* 15 Fla. 201, 280-2.

In view of the pleadings, the order directing Grant to take possession of all the property of The Struthers Furnace Co. should be construed so as to exclude property not covered by the mortgage.

Authorities, *supra.*

Since the petition in foreclosure did not show that there were any creditors other than bondholders, and the suit was merely one to foreclose a mortgage, the order directing the receiver to sue Leach & Co. was void.

Tyler v. *Hamilton,* 62 Fed. 187, 189.

It was not necessary that a separate suit be instituted against Leach & Co. since after decree of foreclosure, the bonds would have to be presented for cancellation and any person presenting a bond would be compelled to prove his title thereto.

Dickerman v. *Northern Trust Co.*, 176 U. S. 181, 194.

If, on the other hand, all these negotiable bonds were in the hands of innocent persons for value, then, of course, they would have to be paid. Not until such payment, would the damage to the mortgagor from the hypostatized wrongful act of Leach & Co. be ascertained. The prosecution of any such claim, however, would not be the function of a mere receiver appointed in foreclosure proceedings. It would be incumbent upon the corporation, stockholders, or other persons damaged by reason of any wrongful act of Leach & Co. to bring suit, if so advised.

The tendency of modern decisions everywhere is to the doctrine that the jurisdiction of a Court or other tribunal to render a judgment affecting individual rights is always open to inquiry when the judgment is relied upon in any other proceeding.

Kilbourn v. *Thompson*, 103 U. S. 168, 197-8.

This is particularly true with respect to persons who are not parties or privies to the judgment attacked.

15 Ruling Case Law, p. 841.

"Jurisdiction" is the power to hear and determine an issue presented by the pleadings.

Sache v. *Gillette*, (Minn.) 112 N. W. 386, 11 L. R. A. (N. S.) 803, 807.

Reynolds v. *Stockton*, 140 U. S. 254.

Spoors v. *Coen*, 44 Ohio St. 497, 9 N. E. 132.
Charles v. *White*, (Mo.) 112 S. W. 545, 21 L. R. A. (N. S.) 481.
Seamster v. *Blackstock*, (Va.) 2 S. E. 36.
Banking House of Castetter v. *Dukes*, (Nebr.) 97 N. W. 805.

Under the foregoing Authorities, the orders entered by the Court of Common Pleas are void because they were not responsive to the pleadings.

III.

In appointing Grant receiver, the Court of Common Pleas transcended the power conferred upon it by Statute and its order was void, not only with respect to the property not covered by the mortgage, but with respect to all other property of the mortgagor.

Section 11894 of the Ohio Code defines the jurisdiction of the Court of Common Pleas to appoint receivers. The said Court has power to appoint a receiver in an action by a mortgagee for the foreclosure of his mortgage only when it appears that the mortgaged property is in danger of being lost, removed or materially injured, or when a condition of the mortgage has not been performed *and* the mortgaged property is probably insufficient to discharge the mortgage debt. This power, however, extends only to the mortgaged property.

The petition in the foreclosure proceedings contained no allegations which brought the case within Section 11894 of the Ohio Code; consequently, the Court of Common Pleas in appointing Grant receiver, transcended the power conferred upon it by Statute with the result that the said order was absolutely void.

Jurisdiction to appoint a receiver cannot be conferred

upon the Court by means of a mere private agreement between the parties to a mortgage.

Baker v. *Varney,* (Cal.) 62 Pac. 100.
Couper v. *Shirley,* (C. C. A. 9th Cir.) 75 Fed. 168.
Jarvis v. *McQuaide,* 53 N. Y. S. 97.
People v. *Weigley,* 155 Ill. 401, 40 N. E. 300.
Cuykendall v. *Corning,* 88 N. Y. 129, 139.
Murray v. *American Surety Co.,* (C. C. A. 9th Cir.) 70 Fed. 341.
Russell v. *Shurtleff,* (Colo.) 65 Pac. 27.
Windsor v. *McVeigh,* 93 U. S. 274.
Bigelow v. *Forrest,* 9 Wall. 339.
U. S. v. *Walker,* 109 U. S. 258.
Wilcox v. *Jackson,* 13 Pet. 498, 511.
Hatch v. *Ferguson,* (C. C. A. 9th Cir.) 68 Fed. 43.

The order is also void, because, contrary to Sections 11279 and 11283 of the Ohio Code and the decisions of the Supreme Court of Ohio, Grant was appointed receiver without notice.

Railway Co. Jewett, 37 Ohio St. 649.
Ober v. *Excelsior Plainting & Mfg. Co.,* (La.) 10 So. 792.

ARGUMENT.

I.

The petitioner is estopped to assert here that the Circuit Court of Appeals was without jurisdiction to determine whether the Court of Common Pleas had conferred or could confer upon Grant power to sue Leach & Co.

In the District Court Leach & Co. denied the authority of Grant as receiver to maintain his suit.[1] Grant offered no evidence concerning his authority in the premises. On appeal Leach & Co. assigned as error and argued in the Circuit Court of Appeals that the District Court had erred in not holding that Grant, as receiver, had no authority to institute or maintain said suit. (Tr. 218.) The Circuit Court of Appeals intimated that the absence of proof of authority to sue would necessitate a reversal so that "either party might correct this omission in the proofs." (Tr. 266.)

The Court suggested that the parties consider whether their rights could be preserved by means of a stipulation that there should be filed in the Circuit Court of Appeals certified copies of the order appointing Grant receiver, the petition on which said order was based, and the order authorizing the institution of the suit against Leach & Co., if any.

The Court informed counsel that if such a stipulation should be made and the documents filed the Court would hear further oral arguments and consider any additional briefs that might be filed. Counsel were also informed that:

> "The further argument desired will be devoted to the question whether authority was *or could be*

1. Respondent's Brief in Opposition to Petition for Writ of Certiorari, pp. 8-9.

conferred upon the receiver, and be rightly based upon the pleadings, in connection with the controlling statutes and equitable principles, and whether such authority would or would not be rightly incidental to and consistent with the nature and purposes of his possession of those assets which passed to the receiver." (Tr. 267.)

Pursuant to the Court's suggestion the stipulation and the documents mentioned on pp. 15-16 of our former brief were filed for the consideration of the Circuit Court of Appeals, as well as briefs by both parties, addressed to the questions above stated. The aforesaid questions were also argued orally by counsel for each party. Neither party objected to the procedure suggested by the Circuit Court of Appeals, nor questioned its jurisdiction in the premises. In other words, both parties consented that upon the documents filed pursuant to stipulation the said Court might determine whether the Court of Common Pleas *had* conferred or *could confer* upon Grant, as receiver, authority to maintain the suit in question.

If petitioner had any objections to the determination of the aforesaid questions by the Circuit Court of Appeals he should have specified them and have refused to sign the stipulation. He might even have qualified his assent. But what did he do? Without making any objections, he signed the stipulation, and filed a brief addressed to the two questions which the Court had said that it would determine. Of course, the Court and the respondent assumed that petitioner did not question the jurisdiction of the Court in the premises.

What the Court did it did as a matter of grace to the petitioner. It was a summary proceeding by the consent of the parties to save time and expense. The Court

had jurisdiction of the subject-matter and of the parties, both of whom plainly consented that the Court might determine the two questions above stated.

Leach & Co.'s appeal and the appearance of the appellee in the Circuit Court of Appeals had vested the said court with jurisdiction of the subject-matter and the parties. The assignment of error that the District Court had erred in not holding that appellee had no authority to maintain said suit was based upon an issue that had been presented to the District Court (Tr. 19) and decided adversely to appellant (see second sentence District Court's opinion, Trans., 202.) It is not a case where the parties attempted by stipulation to confer jurisdiction of *subject-matter* upon a Federal Court. The Circuit Court of Appeals had jurisdiction of the subject-matter and the parties, who merely stipulated that in determining a question previously presented to it for decision the Court might consider certified copies of the record made in the Court of Common Pleas, which Grant, as receiver, for some reason had failed to offer in evidence. Such stipulations are by no means unusual; and of course the courts uniformly hold that they estop the parties thereto from thereafter repudiating them.

Jones Company v. *Munger Improved Cotton Mach. Mfg. Co.* (C. C. A. 5th Cir.) 50 Fed. 785.

Bloomfield R. Co. v. *Grace,* 112 Ind. 128, 13 N. E. 680.

Riggs v. *Commercial Mutual Ins. Co.* 125 N. Y. 7, 10 L. R. A. 684.

Petitioner's present attack upon the jurisdiction of the Circuit Court of Appeals is as untenable as it is belated. This attack is predicated upon Leach & Co.'s ad-

mission in the amended answer that Grant was the duly appointed and qualified receiver of all the property and assets of the Struthers Furnace Company.

But this admission was made long prior to the stipulation that was filed in the Circuit Court of Appeals. Necessarily, the record theretofore made in the District Court—whether by proof or failure to prove, or by pleading or failure to plead—was modified by the stipulation, the documents filed and the consent that the Court might determine the two questions above stated.

Moreover, in its amended answer Leach & Co. denied the allegations in plaintiff'spetition that the Court of Common Pleas had authorized him to sue. The issue thereby raised was not limited to whether the Court of Common Pleas had actually entered an order directing Grant, as receiver, to sue. It necessarily challenged the validity of any such order. This is true because if the order was void it conferred no authority.

It might be contended that Grant's authority to sue turns upon whether he was appointed a receiver for all the property of The Struthers Furnace Company, and that since Leach & Co. admitted in its answer that Grant had been so appointed, the Circuit Court of Appeals was bound to hold that Grant had authority to sue. Such a contention would be untenable for the following reasons:

1. If every receiver of property had by virtue of his appointment authority to sue, then it might be said that an admission that one had been appointed receiver was an admission that he had authority to sue. But under the Ohio Code a receiver cannot sue unless he is expressly so authorized by the Court that appointed him (See authorities cited on pp. 12-14 of our former brief). It follows, therefore, that an admission that one has been appointed

receiver is not an admission that one has authority to sue.

2. The denials as well as the admissions contained in an answer must be considered. In the case at bar Leach & Co. denied that Grant had authority to sue.

3. In the Circuit Court of Appeals Grant expressly agreed that in determining whether he had authority to sue the Court might consider certain specified documents. Necessarily, the legal effect of those documents was for the Court; and the stipulation modified the record made in the District Court, whether by pleading or proof.

4. Grant also stipulated that the said Court might determine whether the Court of Common Pleas *could* authorize him to sue. When Grant stipulated that the Circuit Court of Appeals might consider certain documents and determine whether the Court of Common Pleas either *had conferred* or *could* confer authority upon him to sue, he necessarily consented that the validity of all orders entered by the Court of Common Pleas might be determined by the Circuit Court of Appeals. If the authority to sue rests upon the order appointing Grant receiver, the Circuit Court of Appeals could determine the validity of said order notwithstanding Leach & Co.'s prior admission that Grant had been appointed receiver.

In view of Leach & Co.'s denial that Grant had authority to sue, and the proceedings had in the Circuit Court of Appeals, petitioner is estopped to say here for the first time that the Circuit Court of Appeals had no jurisdiction to determine whether the Court of Common Pleas had conferred or *could* confer authority upon Grant, as receiver, to sue Leach & Co. This is particularly true in view of section 391 of the Judicial Code, which is set forth on p. 16 of our former brief.

II.

The Court of Common Pleas neither conferred nor could confer authority upon Grant to sue Leach & Co. for the following reasons:

1. **The petition to foreclose plainly shows that the mortgage did not cover the alleged claim against Leach & Co. It is true that petitioner prayed that a receiver be appointed for all the property of The Struthers Furnace Co., but this prayer was no part of petitioner's cause of action, and could not authorize any relief not warranted by the facts pleaded.**
2. **"Jurisdiction" means the power to hear and determine an issue presented by the pleadings.**
3. **The order appointing Grant receiver for property not covered by the mortgage, viz., the alleged claim against Leach & Co., and the order directing that suit be brought on said claim were not responsive to the pleadings. Consequently both orders were void.**

The jurisdiction of the Court of Common Pleas must rest upon the foreclosure proceedings. As demonstrated in our former brief a suit by a stockholder solely for the appointment of a receiver is unknown to the law (pp. 19-26). Accordingly, let us analyse the petition that was filed by the Guardian Savings and Trust Company against The Struthers Furnace Company for the foreclosure of a mortgage.

This petition contains two alleged causes of action. Plaintiff alleged as its first cause of action the following facts:

FIRST CAUSE OF ACTION.

That on or about May 1, 1922, the defendant duly authorized an issue of bonds in an amount not to exceed $1,500,000.00, payable to bearer with interest at the rate of 8% per annum, and due on May 1, 1942.

That on or about May 18, 1922, the defendant, being thereunto duly authorized by its Board of Directors and stockholders, delivered to plaintiff as trustee its first mortgage trust deed dated as of May 1, 1922 to secure the payment of the principal and interest of said bonds, etc.

That thereafter all the bonds were duly issued for a valuable consideration in accordance with the terms of said mortgage; that all the bonds were then outstanding in the hands of various persons and corporations, who were the owners and holders thereof for value, and that said bonds were in all respects valid and outstanding obligations of the defendant.

That defendant had defaulted in the payment of the semi-annual installment of interest due on all the said bonds on November 1, 1924, and that the trustee had pursuant to the terms of the mortgage declared the principal of all outstanding bonds due and payable, and had made demand therefor on defendant (Tr. 237-9).

SECOND CAUSE OF ACTION.

All the averments of the first cause of action were adopted by reference.

The plaintiff also averred that to secure the payment of principal and interest certain property had been conveyed to it as trustee by the defendant. The property is then described (Tr. 240-5). Plaintiff alleged that the mortgage contained the following provision:

> "There is not included hereunder any corporate stocks owned by the Company nor any mined ore, coal, coke, supplies, manufactured iron, cash accounts, bills receivable or current assets, all being expressly excluded herefrom." (Tr. 245).

And of course, the alleged claim of The Struthers Furnace Company against Leach & Co. subsequently asserted by Grant as receiver, was not expressly included in said mortgage, neither are there any general provisions under which said claim may be subsumed. This is not to be wondered at because Leach & Co. purchased all the bonds for purpose of resale, pursuant to a contract that ante-dated the trust deed and the resolutions authorizing it (Tr. 12). The contract would never have been executed if either party had thought that it was *ultra vires*. And it is absurd to say that the parties intended that the mortgage should cover a claim by the mortgagor against Leach & Co. arising out of the very contract pursuant to which the bonds were authorized, issued and sold.

Plaintiff also alleged that the mortgage provided that in case of default the trustee should proceed in equity or at law and that pending any action or suit the trustee should be entitled to the appointment of a

> "receiver of the *trust estate,* and of the tolls, earnings, revenues, rents, issues, profits and incomes *thereof.*" (Tr. 246).

Also that in the mortgage the defendant had agreed that in case of default it would waive the issue and service of process; that it would enter a voluntary appearance in any action or suit that might be instituted by the trustee and consent to the entry of a judgment

> "for the recovery and possession of *the trust estate* and of the tolls, earnings, revenues, rents, issues, profits and income *thereof.*" (Tr. 246).

Also that the mortgage had been duly recorded; that default had occurred, etc.

Plaintiff prayed:

> (1) That it have judgment for $1,560,000, being the principal amount and interest due on November 1, 1924, together with interest, etc.,

(2) That said mortgage be declared a valid lien upon the "property therein and herein described."

(3) That "the property described in said mortgage" be sold and applied to the payment of costs and expenses of said sale, expenses and reasonable compensation of trustee and its attorneys and amount due on bonds;

(4) For a deficiency judgment, if necessary;

(5) That a receiver be appointed to take charge of "the property of the defendant to manage, control and conduct the same and collect the rents, earnings, issues, profits and incomes therefrom;"

(6) "That the Court order the defendant or any receiver appointed to take charge of the defendant's property to hold, set apart and sequester any and all amounts received as rents, earnings, issues, profits or incomes by the defendant or any said receiver, from or upon *any of the property described herein,* for the payment of the amount due upon said bonds * * * *" and for general relief. (Tr. 248-9.)

The following facts are significant:

1. The trust deed provided that in case of default a receiver might be appointed for the *trust estate,* which by no means constituted all the property and assets of the mortgagor.

2. Plaintiff did not aver that the mortgagor was insolvent; or that there were any creditors, either judgment or simple-contract, other than bondholders; or that the mortgagor was financially irresponsible; or that the mortgaged property was probably insufficient to discharge the mortgage debt; or that the mortgaged property was in danger of being lost, removed or materially injured, or any other facts which in law justified the appointment of a receiver for any of the property of the defendant, much less for all its property.

Let us assume for the purposes of argument that the provision in the trust deed that a receiver might be appointed for the *mortgaged property* in case of default would justify the appointment of a receiver for the aforesaid mortgaged property, despite Section 11894 of the Ohio Code. No facts were averred which would justify the appointment of a receiver for property not covered by the trust deed.

It is true that the plaintiff prayed that a receiver be appointed for "the property of the defendant." But the prayer is no part of the cause of action. It is merely a request for certain relief. It is no part of the issues to be tried.

Glass Co. v. *Stoehr*, 54 O. S. 157.
Culver v. *Rodgers*, 33 O. S. 537.

In

21 Corpus Juris, p. 679

it is said:

> "The prayers may be considered to elucidate the allegations of the bill, but cannot authorize relief not warranted by the case made by such allegations."

The same is true of pleading under the codes. In

31 Cyc. p. 110

it is said:

> "The prayer for relief forms no part of the statement of the cause of action; and it is unimportant unless there is ambiguity of statement. * * * The facts alleged, and not the relief demanded, are of chief importance, and they determine the relief to be granted."

That plaintiff prayed for the appointment of a receiver for "the property of the defendant" is unimpor-

tant. The point is, that no facts were pleaded which would justify the appointment of a receiver for any property not covered by the trust deed. And whether a receiver should be appointed for property not covered by the trust deed was not an issue to be tried. The appointment of a receiver for such property would not be responsive to the pleadings, or within the scope of the foreclosure proceedings.

The purpose of foreclosure proceedings is to bar the mortgagor and those claiming under him.

Gennes v. *Peterson* (Ore.) 103 Pac. 515.

It is to determine the amount due to the mortgagee and to obtain a decree that will enable the mortgaged property to be sold and the proceeds to be applied to the satisfaction of the mortgage debt.

19 Ruling Case Law, § 327, p. 525.

General creditors and other persons having no judgment or other lien on the mortgaged property cannot intervene.

19 Ruling Case Law, p. 536.

It follows, therefore, that the claim asserted by Grant, as receiver, against Leach & Co., which grew out of the original contract for the purchase of all the bonds for re-sale to the general public, was in nowise involved in the foreclosure proceedings. The Court of Common Pleas was without jurisdiction to vest the receiver with title to said claim, or to direct that he bring suit on it against Leach & Co. In

42 Corpus Juris, § 1702, p. 127,

with reference to the power of the court to direct a re-

ceiver to take charge of property not covered by the mortgage, it is said:

> "He [the receiver] cannot be authorized to take charge of property not covered by the mortgage."

That the action of the Court, in appointing a receiver for property not covered by the mortgage was *void*, see, in addition to the cases cited on p. 28 of our former brief, the following:

Staples v. *May*, (Cal.) 25 Pac. 346, 348.

Alabama Nat. Bank v. *Mary Lee Coal & Railway Co.* (Ala.) 19 So. 404.

St. Louis, A. T. R. Co. v. *Whitaker*, (Tex.) 55 S. W. 448, 451.

Central Trust Co. v. *Worcester Cycle Mfg. Co.* 114 Fed. 659.

State of Florida v. *Jacksonville, P. & M. R. Co.*, 15 Fla. 201, 280-2.

At least, the order of the Court appointing Grant receiver must be construed so as to exclude property not covered by the mortgage.

Smith v. *McCullough*, 104 U. S. 25.

Central Trust Co. v. *Worcester Cycle Co.*, 659, 662.

And so far as the order directing Grant, as receiver, to sue Leach & Co. is concerned, the order was void. The record in the Court of Common Pleas does not show that there were any creditors other than bondholders. The plaintiff expressly alleged that all the bonds had been duly and regularly issued for value, and that the mortgage had been duly and regularly authorized by the Board of Directors and the stockholders of the mort-

gagor. The record does not show that the foregoing allegations were controverted by the mortgagor.

What interest had the receiver in the contract between Leach & Co. and the mortgagor, pursuant to which all the bonds had been issued and sold first to Leach & Co. for resale to the investing public?

In

Tyler v. *Hamilton*, 62 Fed. 187

where the receiver had filed a bill to contest the validity of certain leases executed after the mortgage, the Court held as stated in the following syllabus:

> "Leases of property of a corporation to a director, who held nearly all its stock, were assented to or ratified by the other directors, who held all the remaining stock. *Held*, that a receiver of the corporation, appointed in a suit to foreclose a mortgage of its property, could not contest the validity of the leases, he not representing creditors, and no circumstances being alleged vesting in him equities to maintain such a suit or to question the lessee's rights."

On p. 189 the Court (Judge Gilbert) said:

> "The receiver is in no attitude to contest the validity of those leases. He was a receiver appointed in the foreclosure suit to take charge of the mortgaged property pending the foreclosure. He is not shown to represent creditors, and no circumstances are alleged to exist which would vest in him equities to maintain this suit, or to question the rights of the defendants under the leases. A court of equity will, under certain circumstances, set aside a contract between a corporation and its directors, at the option of its stockholders, or at the suit of creditors. It may be said that, in general, the dealings of the directors with the corporation are viewed with suspicion. The director occupies a fiduciary relation to the stockholders whom he represents, and his contracts concerning the prop-

erty which is the subject of the trust are generally voidable at the instance of the party whose interest he represents. But such dealings are not absolutely prohibited, and they will be sustained if they are fair, and have been entered into in good faith, and no advantage has been taken of the fiduciary relation. *Oil Co.* v. *Marbury,* 91 U. S. 587-589; *Hotel Co.* v. *Wade,* 97 U. S. 13; *Stark* v. *Coffin,* 105 Mass. 328; *Buell* v. *Buckingham,* 16 Iowa, 284. In the case before the court the stockholders were all directors of the company, and they all assented to and ratified the leases. Hunt's relation to the other directors was not that of a trustee to *cestuis que trustent.* He sustained no fiduciary relation to them that they did not likewise sustain to him. In making the leases, he represented not the other stockholders, but himself; and they represented themselves, and not Hunt. They were not in the attitude of stockholders who had confided their interests to a board of directors, but they were themselves clothed with the power of directors, and were in a position each to protect his own interest. None of these stockholders is now here attacking the leases; neither does the corporation offer to rescind the same. No creditor of the corporation is here asserting his rights, and, if there were, no facts are shown upon which equitable relief to creditors might be predicated."

In the Court of Common Pleas it did not appear that there were any creditors other than bondholders. It did not appear that the mortgaged property was insufficient to pay the mortgaged debt, or that the mortgagor was insolvent. Leach & Co. was not a director but only a minority stockholder in The Struthers Furnace Company and in the foreclosure proceedings the plaintiff alleged that the mortgage had been duly authorized by the Board of Directors and the stockholders of The Struthers Furnace Co., and that all the bonds had been issued for value, etc. (p. 13, *supra*). Apparently a receiver was appointed without notice to defendant. At

any rate, the record does not show that the said defendant ever denied the allegations just referred to.

Neither did it appear whether Leach & Co. then held any of the bonds. If Leach & Co. held any bonds at that time, decree of foreclosure could be first entered and then when the bonds were brought into court for cancellation Leach & Co. would have to prove its title thereto.

Dickerman v. *Northern Trust Co.* 176 U. S. 181, 194.

If all the negotiable bonds were in the hands of innocent purchasers for value, then of course they would have to be paid. So long as there were no creditors other than bondholders; and the mortgaged property was sufficient to pay the mortgage debt; and the corporation was not complaining; and the transaction had been consummated years before, what authority could be given to this mere custodian of the mortgaged property to attack by means of an independent suit in a foregin jurisdiction and outside of Mahoning County the very contract pursuant to which all the bonds had been issued and sold?

But it may be said that this is a collateral attack on the order appointing Grant receiver of the claim against Leach & Co. and on the order directing him to sue Leach & Co; that the Court had jurisdiction of the foreclosure proceedings and general power to appoint a receiver in proper cases, and that consequently Leach & Co. cannot complain.

Such an assertion would be based upon a misapprehension of the law of Collateral Attack. We admit that this is a collateral attack on the orders in question;

but with respect to the Court of Common Pleas, we assert that it did not have *jurisdiction* to enter the aforesaid orders, and that hence they may be collaterally attacked, not only for the reasons heretofore assigned, but for those that will now be stated.

In

Kilbourn v. *Thompson,* 103 U. S. 168, 197-8,

this Court said:

> "The tendency of modern decisions everywhere is to the doctrine that the jurisdiction of a court or other tribunal to render a judgment affecting individual rights, is always open to inquiry, when the judgment is relied on in any other proceeding. See *Williamson* v. *Berry,* 8 How. 495; *Thompson* v. *Whitman,* 18 Wall. 457; *Knowles* v. *The Gas-Light & Coke Co.,* 19 id. 58; *Pennoyer* v. *Neff,* 95 U. S. 714."

This is particularly true in the circumstances presented by this case.

> "On the other hand it is generally held that where the rights of persons not parties or privies to a proceeding are adversely affected by the judgment rendered therein such persons are allowed to impeach it whenever it is attempted to be enforced against them, or whenever in any such case its validity is drawn in question, since they have no remedy against the judgment by appeal or otherwise in the case itself."
>
> 15 Ruling Case Law, p. 841.

Leach & Co., of course, was neither a party nor a privy to the foreclosure proceedings so far as the claim asserted by Grant is concerned.

Now, just what is meant by *jurisdiction?* It means power to hear and determine *an issue presented by the pleadings.* In other words, a court must have power to

hear and determine the precise matter which it assumes to determine.

This rule is the one that existed at common law, and is the one that is applied by this Court and the Supreme Court of the State of Ohio. It is cogently stated in

Sache v. *Gillette,* (Minn.) 112 N. W. 386, 11 L. R. A. (N. S.) 803, 807,

as follows:

> "The mere fact that the court has jurisdiction of the subject-matter of an action before it does not justify an exercise of a power not authorized by law, or a grant of relief to one of the parties the law declares shall not be granted. If the court may do so under the guise of 'jurisdiction of the subject-matter,' then it may commit all sorts of depredations upon the rights of the parties, particularly in default cases.
>
> 'Jurisdiction of the subject-matter' means, not only authority to hear and determine a particular class of action, but authority to hear and determine the particular questions the court assumes to decide. Though it has general jurisdiction over the subject-matter, for instance, of actions to foreclose mortgages, to quiet title to real property, or for damages for personal injuries, its power to decide and determine matters in dispute between the parties in a given action is limited to those questions which are brought before it by the pleadings.
>
> The foundation of the rule that judgments of a court of competent jurisdiction are attended with a presumption of absolute verity is the fact that the parties have been properly brought into court and given an opportunity to be heard upon the matters determined. But the foundation falls and the rule of verity ceases when it affirmatively appears from the record that the judgment adjudicated and determined matters upon which the parties were not heard. When the court goes beyond and outside the issues made by the pleadings, and, in the absence of one of the parties, determines rights against him

> which he has not submitted to it, the authority of the court is exceeded, even though it had jurisdiction of the general subject of the matters adjudicated. Such a departure cannot be held a mere irregularity. This position is sustained both from the viewpoint of our statutes upon the subject and under the rules and principles of the common law."

And again:

> "But the weight of authority sustains the proposition that at common law the judgment is void for want of jurisdiction. In fact, it may be said our statute created no new rule on the subject, but merely adopted that existing at common law. It is laid down in Black on Judgments, 242, as a general principle, that, in addition to jurisdiction of the parties and subject-matter of the action, it is necessary to the validity of a judgment that the court should have had jurisdiction of the precise question which the judgment assumes to decide, or the particular remedy or relief which it assumes to grant. Support for this doctrine is found in numerous well-considered cases."

The Court then proceeds to make a scholarly and exhaustive survey of the authorities, including several decided by this Court.

In the case before the Supreme Court of Minnesota an action to quiet title had been instituted. Plaintiff had alleged that defendant claimed some right, title or interest in certain real estate. There had been personal service and the entry of default. The court below, however, had entered judgment vesting defendant's interest in plaintiff.

In

Windsor v. *McVeigh*, 93 U. S. 274, 282,

Mr. Justice Field, speaking for the Court, said:

> "The doctrine invoked by counsel, that, where a court has once acquired jurisdiction, it has a right

to decide every question which arises in the cause, and its judgment, however erroneous, cannot be collaterally assailed, is undoubtedly correct as a general proposition, but, like all general propositions, is subject to many qualifications in its application.

All courts, even the highest, are more or less limited in their jurisdiction; they are limited to particular classes of actions, such as civil or criminal; or to particular modes of administering relief, such as legal or equitable; or to transactions of a special character, such as arise on navigable waters, or relate to the testamentary disposition of estates; or to the use of particular process in the enforcement of their judgments. *Norton* v. *Meador,* Circuit Court for California. Though the court may possess jurisdiction of a cause, of the subject-matter, and of the parties, it is still limited in its modes of procedure, and in the extent and character of its judgments. It must act judicially in all things, and cannot then transcend the power conferred by the law.

If, for instance, the action be upon a money demand, the court, notwithstanding its complete jurisdiction over the subject and parties, has no power to pass judgment of imprisonment in the penitentiary upon the defendant. If the action be for a libel or personal tort, the court cannot order in the case a specific performance of a contract. If the action be for the possession of real property, the court is powerless to admit in the case the probate of a will. Instances of this kind show that the general doctrine stated by counsel is subject to many qualifications. The judgments mentioned, given in the cases supposed, would not be merely erroneous; they would be absolutely void; because the court in rendering them would transcend the limits of its authority in those cases. See the language of Mr. Justice Miller, to the same purport, in the case of *Ex parte Lange,* 18 Wall. 163. So it was held by this court in *Bigelow* v. *Forrest,* 9 id. 351, that a judgment in a confiscation case, condemning the fee of the property, was void for the remainder, after the termination of the life-estate of the owner. To the objection that the decree was conclusive that the entire fee was con-

fiscated, Mr. Justice Strong, speaking the unanimous opinion of the court, replied: 'Doubtless a decree of a court, having jurisdiction to make the decree, cannot be impeached collaterally; but, under the act of Congress, the District Court had no power to order a sale which should confer upon the purchaser rights outlasting the life of French Forrest (the owner). Had it done so, it would have transcended its jurisdiction.' Id. 350.

So a departure from established modes of procedure will often render the judgment void; thus, the sentence of a person charged with felony, upon conviction by the court, without the intervention of a jury, would be invalid for any purpose. The decree of a court of equity upon oral allegations, without written pleadings, would be an idle act, of no force beyond that of an advisory proceeding of the Chancellor. And the reason is, that the courts are not authorized to exert their power in that way.

The doctrine stated by counsel is only correct when the court proceeds, after acquiring jurisdiction of the cause, according to the established modes governing the class to which the case belongs, and does not transcend, in the extent or character of its judgment, the law which is applicable to it. The statement of the doctrine by Mr. Justice Swayne, in the case of *Cornell* v. *Williams,* reported in the 20th of Wallace, is more accurate. 'The jurisdiction,' says the justice, 'having attached in the case, every thing done *within the power of that jurisdiction,* when collaterally questioned, is held conclusive of the rights of the parties, unless impeached for fraud.' 20 Wall. 250.''

Now let us briefly notice the cases that hold that a judgment that undertakes to grant relief that is *not responsive* to the pleadings is *void.* A leading case is

Reynolds v. *Stockton,* 140 U. S. 254.

In that case it appeared that suit had been instituted by certain policy-holders (and one stockholder) in the

Hope Mutual Life Insurance Co., a New York corporation against the Superintendent of the Insurance Department of the State of New York and Joel Parker, as Receiver of the New Jersey Mutual Life Insurance Co., which some years before had taken over the assets and assumed the liabilities of the life insurance company first above mentioned. The purpose of the suit was to seize and appropriate to the claims of plaintiffs a fund of $100,000. in securities which the New York Company had deposited with said Superintendent for the protection of policy-holders. Answers were duly filed and a decree for the plaintiffs was entered. In this decree the Court reserved the question of Parker's liability as receiver "as reported by the referee." Subsequently on notice the Court entered a decree against Parker as receiver for $1,010,496.29. This happened in New York. Stockton was Parker's successor. Suit was thereafter instituted against Stockton in New Jersey on the New York judgment. Judgment was rendered for the defendant, and it was contended in the Supreme Court that full faith and credit had not been extended to the New York judgment.

Mr. Justice Brewer rendered the opinion of this Court:

> "The invalidity of the judgment depends upon the fact that it is in no manner responsive to the issues tendered by the pleadings. This idea underlies all litigation. Its emphatic language is, that a judgment, to be conclusive upon the parties to the litigation, must be responsive to the matters controverted." * * *
>
> "In the opinion of the Court of Errors and Appeals, the case of *Munday* v. *Vail*, 34 N. J. Law, 418, is cited. In that case, the proposition stated in the syllabus, and which is fully sustained by the opinion, is, that 'a decree in equity, which is entirely aside of the issue raised in the record, is invalid,

and will be treated as a nullity, even in a collateral proceeding.' It appeared that on May 12, 1841, Asa Munday, the owner, with his wife, Hetty Munday, conveyed the premises for which the action (which was one of ejectment) was brought, to John Conger, upon the following trust, to wit: 'For the use and benefit of the said Asa Munday and wife, and the survivor of them, with the remainder to the children of said Asa Munday and wife, in equal parts and shares, in fee.' Plaintiff was the sole surviving issue of Asa Munday and Hetty Munday, and took, under the facts, all the title which, on the 12th of May, 1841, was vested in Asa Munday. On January 16, 1844, Ephraim Munday filed his bill in the Court of Chancery, setting forth that he had loaned certain moneys to Asa Munday upon an agreement that he, the said Asa, would secure said loan by a mortgage upon his land, including the premises in question; and that Asa, in violation of his agreement, and to defraud him of his rights, had conveyed them away to John Conger, upon the trust already mentioned. The bill also showed that plaintiff had obtained judgment for his debt. The prayer was, 'that the deed of conveyance of said lands so made by the said Asa Munday and Hetty, his wife, to the said John Conger, and the said deed and declaration of trust so made, and executed by the said John Conger and wife as aforesaid, may, by the order and decree of this honorable court, be set aside and declared to be fraudulent and void against the said judgment and writ of execution of your orator, and that the said judgment and execution of your orator may be decreed a lien on said lands and tenements so conveyed to said John Conger,' etc. Plaintiff was a defendant in that action, and, then an infant, appeared by her father as guardian. The decree, which was entered on the 15th of December, 1846, was generally that the said deed from Asa Munday and wife to Conger was fraudulent, null and void, and of no force whatever in law or equity; and ordered and adjudged that it be delivered up to be cancelled; and further, that the plaintiff's judgment is and was a lien. No proceedings were had under this decree, the money due plaintiff having been paid or secured to him. Subsequently, and on

September 15, 1851, a decree for costs against Asa Munday, in another suit, was entered in the Chancery Court. Upon such decree the property in question was levied upon and sold to defendant. The validity of the title acquired by this proceeding was the matter in controversy. The title of plaintiff was good under the trust deed of May 12, 1841, unless defeated by this sale and the deed made thereon; and defendant's title, adverse to plaintiff's, depended on the question whether the decree of December 15, 1846, was valid to the extent of its language, annulling absolutely the conveyance from Asa Munday and wife to John Conger, and directing the surrender of such deed, or, notwithstanding its general language, was to be limited to the matters of inquiry presented by the complaint and answer, and, therefore, simply an adjudication that the deed was voidable, and annulling it so far as it conflicted with the rights of plaintiff in that suit, leaving it to stand good as a deed *inter partes*, and valid as to all other parties. It was held that the latter was the true construction, and that the general language in the decree was limited by the matters put in issue by the pleadings. We quote from the opinion:

'The inqiury is, had the court jurisdiction to the extent claimed? Jurisdiction may be defined to be the right to adjudicate concerning the subject-matter in the given case. To constitute this there are three essentials: First, the court must have cognizance of the class of cases to which the one to be adjudged belongs; second, the proper parties must be present; and third, the point decided must be, in substance and effect, within the issue. That a court cannot go out of its appointed sphere, and that its action is void with respect to persons who are strangers to its proceedings, are propositions established by a multitude of authorities. A defect in a judgment arising from the fact that the matter decided was not embraced within the issue has not, it would seem, received much judicial consideration. And yet I cannot doubt that, upon general principles, such a defect must avoid a judgment. It is impossible to concede that because A and B are par-

ties to a suit, a court can decide any matter in which they are interested, whether such matter be involved in the pending litigation or not. Persons by becoming suitors do not place themselves for all purposes under the control of the court, and it is only over these particular interests, which they choose to draw in question, that a power of judicial decision arises. And again:

'A judgment upon a matter outside of the issue must, of necessity, be altogether arbitrary and unjust, as it concludes a point upon which the parties have not been heard. And it is upon this very ground that the parties have been heard, or have had the opportunity of a hearing, that the law gives so conclusive an effect to matters adjudicated. And this is the principal reason why judgments become estoppels. But records or judgments are not estoppels with reference to every matter contained in them. They have such efficacy only with respect to the substance of the controversy and its essential concomitants. Thus, Lord Coke, treating of this doctrine, says: 'A matter alleged that is neither traversable nor material shall not estop.' Co. Litt. 352 b. And in a note to the *Duchess of Kingston's Case,* in 2 Smith's Lead. Cases, 535, Baron Comyn is vouched for the proposition that judgments 'are conclusive as to nothing which might not have been in question, or were not material.' For the same doctrine, that in order to make a decision conclusive not only the proper parties must be present, but that the court must act upon 'the property according to the rights that appear' upon the record, I refer to the authority of Lord Redesdale. *Gifford* v. *Hort,* 1 Sch. & Lef. 386, 408, See also *Gore* v. *Stacpoole,* 1 Dow. 18, 30; *Colclough* v. *Sterum,* 3 Bligh, 181, 186.' Reference is made in the opinion to the case of *Corwithe* v. *Griffing,* 21 Barb. 9, in respect to which the court said: 'Commissioners in partition, in their distribution, embraced land other than that contained in the petition, and the court confirmed their report, and it was held that such judgment was a nullity, 'as the jurisdiction was confined to the subject-matter set forth and described in the petition.' In this case the court had jurisdic-

tion in cases of partition, and the decision was upon the ground that the decree was void, as it was aside from the issue which the proceedings presented.'

"This case is very much in point. We regard the views suggested in the quotation from the opinion as correct, and as properly indicating the limits in respect to which the conclusiveness of a judgment may be invoked in a subsequent suit *inter partes*. See also, *Unfried* v. *Heberer*, 63 Indiana, 67. In that case, the inquiry was as to the effect of a decree of foreclosure rendered upon default. In the complaint in the foreclosure proceedings the widow and children of the mortgagor were named as parties, he having died prior to the commencement of the suit. The allegation of the complaint was that the defendants were interested as heirs, and the prayer was for a decree foreclosing such interests. It was not averred that the widow had joined in the mortgage, or even that she was a widow; but she was made a defendant, and alleged to be an heir. Subsequently she asserted rights in the premises as widow, and in respect to this decree upon default, the court observed: 'A widow is an heir of her deceased husband only in a special and limited sense, and not in the general sense in which that term is usually used and understood. When the said Anna made default in the action for foreclosure, nothing was taken against her as confessed, nor could have been, which was not alleged in the complaint, and, as nothing was alleged hostile to her claim as widow, it follows that nothing concerning her claim as such widow was concluded against her by the judgment of foreclosure. This proposition we regard as too well founded in principle to need the citation of authorities to sustain it. See, however, *Helms* v. *Love*, 41 Indiana, 210; *Fletcher* v. *Holmes*, 25 Indiana, 458; *Minor* v. *Walter*, 17 Mass. 237.' See also *Goucher* v. *Clayton*, decided by Vice-Chancellor Wood, and reported in 11 Jurist (N. S.) 107; S. C. 34 Law Journal (N. S.) Ch. 239.

"In the case of *Packet Company* v. *Sickles*, 24 How. 333, 341, Mr. Justice Campbell, speaking for the court, declared, that, 'the essential conditions

under which the exception of the *res judicata* becomes applicable are the identity of the thing demanded, the identity of the cause of the demand, and of the parties in the character in which they are litigants. In the case of *Smith* v. *Ontario,* 18 Blatchford, 454, 457, Circuit Judge Wallace observed, that 'the matter in issue' has been defined in a case of leading authority, as 'that matter upon which the plaintiff proceeds by his action, and which the defendant controverts by his pleading.' *King* v. *Chase,* 15 N. H. 9.

But without multiplying authorities, the proposition suggested by those referred to, and which we affirm, is, that in order to give a judgment, rendered by even a court of general jurisdiction, the merit and finality of an adjudication between the parties, it must, with the limitations heretofore stated, be responsive to the issues tendered by the pleadings. In other words, that when a complaint tenders one cause of action, and in that suit service on, or appearance of, the defendant is made, a subsequent judgment therein, rendered in the absence of the defendant, upon another and different cause of action than that stated in the complaint, is without binding force within the courts of the same State; and, of course, notwithstanding the constitutional provision heretofore quoted, has no better standing in the courts of another State.

"This proposition determines this case; for, as has been shown, the scope and object of the suit in the New York court was the subjection of the fund in the hands of the superintendent of the insurance department of that State to the satisfaction of claims against the New York company. The cause of action disclosed in the original complaint was not widened by any amendment; and there was no actual appearance by the receiver Parker or the New Jersey company subsequently to the filing of their answer. No valid judgment could, therefore, be rendered therein, which went beyond the subjection of this fund to those claims."

See also:

Charles v. *White* (Mo.) 112 S. W. 545, 21 L. R. A. (N. S.) 481.

> "A court has no power in a creditors' bill against life tenants and remaindermen to set aside a deed from the debtor to them as in fraud of the rights of the creditor, in which no issue is raised between the life tenants and remaindermen, to devest the title of the latter and vest it in the life tenants as general heirs of the debtor, and a judgment attempting to do so is subject to collateral attack."

Seamster v. *Blackstock,* (Va.) 2 S. E. 36.

> "A widow brought suit in the county court for the sole purpose of having dower assigned her in her deceased husband's lands; the heirs at law, who were infants, being made defendants. The court not only directed an assignment of dower, but, *sua sponte,* decreed a sale of the residue of the land belonging to the heirs. *Held,* that the court having exceeded its jurisdiction, the decree of sale was void, and might be collaterally attacked."

Banking House of Castetter v. *Dukes* (Nebr.) 97 N. W. 805.

Spoors v. *Coen,* 44 Ohio St. 497, 9 N. E. 132.

> "The judgment of a court upon a subject of litigation within its jurisdiction, but not brought before it by any statement or claim of the parties, is null and void, and may be collaterally impeached." (In this case the syllabus was by the Court.)

We have already seen that the relief to be granted depends upon the cause of action stated; that the prayer of a complaint is no part of plaintiff's cause of action; that it constitutes no part of the issues to be tried (pp. 16-17, *supra*). We have likewise seen that the plain-

tiff in the Court of Common Pleas alleged no facts which showed that he was entitled to the appointment of a receiver for property not covered by the mortgage. Neither were any facts alleged that would give the said court jurisdiction to direct either the seizure of any property not covered by said mortgage or the institution of any suit against Leach & Company.

Under the authorities above cited it is too clear for argument that the order appointing Grant receiver of property not covered by the mortgage and the order directing him to sue Leach & Co. were not responsive to the issues; that they were beyond the scope of the proceedings, which was solely for the foreclosure of a mortgage, and that consequently each of said orders was, *pro tanto, void.*

In other words, the record clearly shows that Grant, as receiver, has no authority to maintain this suit; that, as held by the Circuit Court of Appeals, the Court of Common Pleas could not authorize Grant to maintain said suit.

III.

In appointing Grant receiver the Court of Common Pleas transcended the power conferred upon it by statute, and its order was void, not only with respect to the property not covered by the mortgage, but with respect to all other property of the mortgagor.

Section 11894 of the Ohio Code (see p. 22 of our former brief) specifies when and under what circumstances a Common Pleas Court may appoint a receiver. The only two subsections that have any relevancy to the case at bar are subsections 2 and 6, which are set forth in the margin.[2]

So far as subsection 2 is concerned, it will be observed:

1. That a mere failure to perform a condition of the mortgage is not sufficient ground for the appointment of a receiver. In such a case it must also appear that the mortgaged property "is probably insufficient to discharge the mortgage debt."

2. That the court is given power to appoint a receiver for only the *mortgaged property.*

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2. "2. In an *action by a mortgagee, for the foreclosure* of his mortgage and sale of the mortgaged property, when it appears that the mortgaged property is in danger of being lost, removed or materially injured, or that the condition of the mortgage has not been performed, and the property is probably insufficient to discharge the mortgage debt;

"6. *In all other cases in which receivers heretofore have been appointed by the usages of equity.*"

> 3. That a receiver for the mortgaged property may be appointed only when "it appears that the mortgaged property is in danger of being lost, removed or materially injured."

It is also apparent that subsection 2 is a mere codification of the "usages of equity," mentioned in subsection 6. A receivership in foreclosure is an extraordinary remedy, and not a matter of right. A strong showing must be made to obtain this equitable remedy; and from time immemorial courts have refused to grant the remedy against a mortgagor in possession pending foreclosure where the said mortgagor is solvent, the mortgage security is adequate, and the mortgaged property is not in danger of being lost, removed or materially injured.

> Jones on Mortgages (8th ed.) § 1948 (original section 1532)

By referring to our analysis of the petition to foreclose (pp. 12-15, *supra*), the Court will observe:

> That there are no allegations that the mortgaged property is in danger of being lost, removed or materially injured; or that the said property is probably insufficient to discharge the mortgage debt; or that the mortgagor is insolvent, or in imminent danger of insolvency; or that it has been dissolved; or any other facts which bring the case within the requirements of subsection 2 of Section 11894.

True, the plaintiff alleged that the trust deed provided that in case of default and the institution of legal proceedings, the trustee should be entitled to a receiver for the mortgaged property. But this is a question of *jurisdiction* of the Court of Common Pleas to appoint a receiver. Needless to say, that jurisdiction is defined by the Code; and if the Code has not conferred juris-

diction, the parties to the trust deed cannot do so by means of a mere private agreement.

Baker v. *Varney* (Cal.) 62 Pac. 100, cited and quoted from on pp. 27-8 of our former brief.

We respectfully submit that since the Code does not confer jurisdiction upon a Court of Common Pleas to appoint a receiver in foreclosure proceedings whenever the parties to a mortgage have agreed that one may be appointed, it necessarily follows that the jurisdiction does not exist. See also:

Couper v. *Shirley* (C. C. A. 9th Cir.) 75 Fed. 168.

Jarvis v. *McQuaide,* 53 N. Y. S. 97.

People v. *Weigley,* 155 Ill. 401, 40 N. E. 300.

Cuykendall v. *Corning,* 88 N. Y. 129, 139.

Now let us notice a few authorities which hold that where a court transcends the powers granted by statute its judgment or order is void and may be collaterally attacked. In

Murray v. *American Surety Co.* (C. C. A. 9th Cir.) 70 Fed. 341

the Court held as indicated in the following syllabus:

"The California 'Bank Commissioners' Act' (St. 1877-78, p. 740, as amended by St. 1886-87, p. 90) provides in section 11 that if the commissioners shall find that any bank has violated its charter or law, or is conducting business in an unsafe manner, they shall require it to discontinue such practices; and in case of refusal, or whenever it shall appear to the commissioners unsafe for the bank to continue business, they shall notify the attorney general, who may commence suit to enjoin the transaction of business by such bank; and, upon the hearing of such suit, the court may issue the injunction, and direct the commissioners to take such proceedings

against the bank as may be decided on by its creditors. The section also empowers the commissioners to supervise the affairs of banks in process of liquidation, limit the number of their officers and employes, and requires reports to the commissioners by such banks. HELD, that a court in which proceedings are instituted by the attorney general against a bank pursuant to such statute has no jurisdiction to appoint a receiver of the property of the bank in such proceedings, though the bank commissioners and the creditors of the bank consent, and though there are provisions in the Code of Civil Procedure authorizing the appointment of receivers in other proceedings. 59 Fed. 345, and 61 Fed. 273, affirmed.

"The exercise by a court, in purely statutory proceedings, of a power not authorized by the statute, is null and void, and may be collaterally attacked."

The case of

Russell v. *Shurtleff* (Colo.) 65 Pac. 27,

is particularly valuable because of its review of some leading cases decided by this Court. In that case it was held:

"Under Mills' Ann. Code, § 169, providing that, if there is no answer, the relief granted to plaintiff shall not exceed that which he shall have demanded in his complaint, where the complaint prayed for judgment for a certain sum less one-fourth thereof, with interest, in the proportion of the respective interests of the defendants, a joint judgment against all the defendants for such sum on their default is beyond the jurisdiction of the court, and void.

"Under Mills' Ann. Code, § 49, providing that the complaint shall contain a demand for the relief which plaintiff claims, a complaint demanding judgment against several defendants for a certain sum less one-fourth thereof in the proportion of their respective interests, and for other and further relief, as the court might deem just and equitable, does not authorize a joint judgment against all the defendants on their default, since the general prayer

is not such a demand for relief as will support a default judgment."

The Court said:

"Section 169, Mills' Ann. Code, expressly provides that, if there be no answer, the relief granted the plaintiff shall not exceed that which he shall have demanded in his complaint. The prayer of the complaint in this case was for a several judgment in proportion to the respective interests of the defendants. The one rendered was joint for the entire sum. That this was error cannot be successfully controverted. Whether it rendered the judgment void, or merely voidable, is the crucial question. One of the essentials of a valid judgment is that the court pronouncing it must have jurisdiction to render that particular judgment (*Newman* v. *Bullock,* 23 Colo. 217, 47 Pac. 379; 12 Am. & Eng. Enc. Law (1st Ed.) 246); and, if it appears from the record of a judgment that the court in pronouncing it acted without jurisdiction, it is void (*People* v. *District Court,* 22 Colo. 422, 45 Pac. 402; *Brown* v. *Wilson,* 21 Colo. 309, 40 Pac. 688, 52 Am. St. Rep. 288; *Great West Min. Co.* v. *Woodmas of Alston Min. Co.,* 14 Colo. 90, 23 Pac. 908). The distinction between void and voidable judgments is often refined, and difficult of solution. 'A judgment may be erroneous, and not void; and it may be erroneous because it is void.' *Ex parte* Lange, 18 Wall. 163, 21 L. Ed. 872.

"There can be no doubt, as stated in *Newman* v. *Bullock, supra,* 'that the tendency of the later authorities, especially in the federal courts, is to enlarge the definition of jurisdiction to make it include not only the power to hear and determine, but also the power to render the particular judgment in the particular case.' This doctrine is based upon the proposition that, if a court is not invested with power to render a particular judgment, its attempt to do so is without its jurisdiction, and must not be confounded with the proposition that the rendition of an erroneous judgment within its power is but the erroneous exercise of its jurisdiction. With full jurisdiction to pronounce a judgment which would

be bindng upon the defendants and their property, the power and authority of the county court was limited by definite, statutory provisions as to the character of relief which could be granted against defendants who had not answered. By directing a joint judgment when an individual one only was prayed for, the trial court transcended its authority, and violated express statutory commands; for, although its jurisdiction attached to the parties, a judgment not within the powers granted by the law of its organization is void. *Ex parte Lange, supra*: *U. S.* v. *Walker,* 109 U. S. 258, 3 Sup. Ct. 277, 27 L. Ed. 927.

"*U. S.* v. *Walker* was an action by an administrator de bonis non on the bond of an administratrix to recover money received for assets of the estate collected by the latter, and which, by order of the court, in the settlement of her account as administratrix, she was directed to pay over to the administrator de bonis non. The law of the jurisdiction under which the administratrix acted provided that upon the removal of an administrator the court shall have authority to direct that assets of the deceased in his hands, which may remain unadministered, be delivered to the newly-appointed administrator. The court concluded that this statute did not change the common-law rule to the effect that an administrator de bonis non derives his title from the deceased, and not from the former administrator; that to him is committed only the administration of the assets of the deceased which have not been administered; and, therefore, assets of the estate which had been converted into money by the former administrator were funds to which he was not entitled. It was urged that the decree directing the administratrix to pay over these funds to her successor was conclusive in the suit upon her bond, for the reason that such decree could not be collaterally attacked. The supreme court held to the contrary, because, as stated, in effect, the court directing the decree exceeded its jurisdiction, in that its authority for making the order was limited to assets of the decedent in the hands of the administrator which were not administered upon.

"*Bigelow* v. *Forrest,* 9 Wall. 339, 19 L. Ed. 696, was an action of ejectment. Bigelow, who was de-

fendant in the trial court, relied for title on a sale made under a decree of the United States district court rendered in a proceeding for the confiscation of the premises sued for under the act of July 17, 1862. This act provided that the property of an officer of the army or navy of the Confederate government might be seized and sold, which proceedings should operate to devest the owner of the property so seized of any interest therein during his life. Under this act a decree had been rendered which purported to direct a sale of the property in fee. The heir of the owner claimed that the decree was void in so far as it purported to direct an unconditional confiscation of the property in question. In the action of the ejectment it was contended that this question could not be raised collaterally. The supreme court said: 'Doubtless, a decree of a court having jurisdiction to make the decree cannot be impeached collaterally, but under the act of Congress the district court had no power to order a sale which should confer upon the purchaser rights outlasting the life of French Forrest;' and the court therefore held that so much of the decree of the court in which the confiscation proceedings were had as was in excess of its powers was void."

The Court then quoted from *Windsor* v. *McVeigh*, 93 U. S. 274, and continued its opinion as follows:

"In the case at bar, when the court directed a joint, instead of a several, judgment, as prayed in the complaint, in the face of an express provision of the Code that the relief granted in the circumstances of this case could not exceed that prayed for, it did that which was beyond its power, and foreign to its authority, and hence without its jurisdiction. 1 Freem. Judgm. (4th Ed.) sec. 116."

See also:

Windsor v. *McVeigh*, 93 U. S. 274.

Bigelow v. *Forrest*, 9 Wall. 339.

United States v. *Walker*, 109 U. S. 258.

Wilcox v. *Jackson*, 13 Pet. 498, 511.

Hatch v. *Ferguson* (C. C. A. 9th Cir.) 68 Fed. 43.

The foregoing authorities are particularly applicable to property not covered by the mortgage, viz., the mortgagor's alleged claim against Leach & Co.

Of course, if the Court of Common Pleas did not have the power to appoint a receiver for such "property", it necessarily follows that the title of the mortgagor thereto remained unimpaired by the order appointing a receiver. The record does not show that any assignment of the alleged claim ever was made by the mortgagor to Grant as receiver. And, of course, the order directing that Grant bring suit against Leach & Co. was *coram non judice* and void.

Cases holding that stockholders in a corporation cannot question an order directing a receiver to sue stockholders on subscription agreements or to enforce other statutory liability to creditors are clearly not in point. Stockholders are bound by what binds the corporation in such circumstances.

Furthermore, the record shows that Grant was appointed receiver without notice to The Struthers Furnace Company. The petition to foreclose was filed on January 15, 1925 (Tr. 250). The Baldwin suit was instituted on January 15, 1925 (Tr. 254). An order appointing Grant receiver was entered in the Baldwin suit, after consolidation, on January 20, 1925 (Tr. 259) and in the foreclosure suit on January 22, 1925 (Tr. 251).

Section 11279 of the Ohio Code reads as follows:

> "A civil action must be commenced by filing in the office of the clerk of the proper court a petition, and causing a summons to be issued thereon."

Section 11283 provides, *inter alia,* that—

> "When the time for bringing parties into court is

> not fixed by statute, the summons shall be returnable on the second Monday after its date."

January 15, 1925, was on a Thursday. The second Monday after January 15th would be January 26th. Yet Grant was appointed receiver on Tuesday, January 20, 1925, before the defendant was bound to enter an appearance, and before, so far as the record shows, it had appeared. The orders recite that the cause was heard upon the petitions that a receiver be appointed forthwith, and that the Court granted the "prayers" of said petitions. It does not appear that The Struthers Furnace Co. had then been even served with process.

In

Railway Co. v. *Jewett,* 37 Ohio St. 649,

it was held:

> "The appointment of a receiver to take from defendant the possession of his property, cannot be lawfully made, unless the delay required to give such notice will result in irreparable loss."

In addition to the cases cited in the opinion in the case above mentioned, see:

> *Ober* v. *Excelsior Planting & Mfg. Co.* (La.) 10 So. 792.

There was absolutely no showing made in the petitions that any loss would result from the delay requisite to give notice. Indeed the appointment of a receiver "forthwith" was not asked in either petition. No facts were alleged which justified the appointment of a receiver to preserve the property from injury, etc. (pp. 12-15, *supra*). Here again the action of the court was

not responsive to the pleadings; here again the court transcended the powers granted by law.

The order appointing the receiver was also void for the reason that it authorized the receiver to manage and conduct the business of the defendant corporation. What possible justification was there for such action by the Court in the foreclosure proceedings? Here again the order was not responsive to the pleadings. Certainly such drastic action should not have been taken without notice. And since Leach & Co. was neither a party nor a privy to the proceedings in the Court of Common Pleas, it follows that it may question the jurisdiction of the said Court in this case (pp. 22-35, *supra*).

The cases cited by petitioner on the general subject of collateral attack are so manifestly inapplicable to the facts in the case at bar as not to call for an analysis of them.

We have always been and are now convinced that this Court must under the statute take the entire case, and that the respondent is entitled to argue that even if the petitioner were entitled to institute his suit, the undisputed facts disclosed by the record prevent a recovery as a matter of law.

However, counsel for petitioner have acquainted us with the correspondence that passed between them and the Chief Justice, and for that reason we have not discussed the merits.

The amount involved is large; and of course we wish to be heard on the merits, either by this Court or by the Circuit Court of Appeals, in the event that this Court

holds that the Circuit Court of Appeals erred in not passing on the merits.

Respectfully,

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1928.

No. [redacted] 9

HUGH W. GRANT, Receiver of the Struthers Furnace Company,

Petitioner,

vs.

A. B. LEACH & COMPANY, INC.,

Respondent.

RESPONDENT'S SUGGESTIONS IN OPPOSITION TO MOTION OF GRANT. AS TRUSTEE IN BANKRUPTCY. TO INTERVENE AS A PARTY PLAINTIFF.

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GUNTHORP-WARREN PRINTING COMPANY, CHICAGO.

SUBJECT INDEX.

	Page
Some essential facts	2-4
Summary of argument	4
Argument	5-9
Point I	5-6
Point II	7
Point III	7-9

TABLE OF CASES.

Bagley, The William, 5 Wall. 377, 412, 18 L. ed. 583	8
Blatchford v. Newberry, 100 Ill. 484, 492-3	8
Brictson Mfg. Co. v. Woodrough, 284 Fed. 484	7
Bryson v. Great Northern Ry. Co. (Mont.) 203, Pac. 529, 532	8
Cauffiel v. Lawrence, 256 Fed. 714	7
Chewaucan River, In re, 89 Ore. 659, 171 Pac. 402	8
First Trust Co. v. Illinois Cent. R. Co., 252 Fed. 965, certiorari denied 39 S. Ct. 390	7
Harrison et al. v. Nixon, 9 Pet. 483, 493, 527	8
Hill v. Wilson, 210 Fed. 200	7
Hopkins v. Lancaster, 254 Fed. 190	7
Marsh v. Nichols, 120 U. S. 598, 7 Sup. Ct. 704, 30 L. ed. 796	8
People's Mutual Life Ins. Co. v. Fagan, 143 Ark. 78, 219 S. W. 738	8
Railway Company v. Twombly, 100 U. S. 78, 81	5
Schell v. Leander Clark College, 10 Fed. (2d) 542	7
Struthers Furnace Co. v. Grant, 30 Fed. (2d) 576	4
Succession of Herdman, (La.) 97 So. 664	8
United Copper Securities Co. v. Amalgamated Copper Co., 244 U. S. 261	5
United States v. Innerarity, 19 Wall. 595, 22 L. ed. 202	6
United States v. Patterson, 15 How. 10, 14 L. ed. 578	7, 8
Vannier v. Anti-Saloon League, 238 N. Y. 457, 144 N. E. 679	6
Wenborne-Karpen Dryer Co. v. Cutler Dry Kiln Co. (C. C. A. 2nd Cir.), 292 Fed. 861, certiorari denied 44 Sup. Ct. 36, 263 U. S. 708	8

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1928.

No. 479

HUGH W. GRANT, Receiver of the Struthers Furnace Company,

Petitioner,

vs.

A. B. LEACH & COMPANY, INC.,

Respondent.

RESPONDENT'S SUGGESTIONS IN OPPOSITION TO MOTION OF GRANT, AS TRUSTEE IN BANKRUPTCY, TO INTERVENE AS A PARTY PLAINTIFF.

MAY IT PLEASE THE COURT:

We shall disregard the obvious formal defects of the motion for leave to intervene in the case at bar, and assume that it is a motion by Hugh W. Grant, as trustee in bankruptcy in the matter of The Struthers Furnace Company, a corporation, bankrupt, for leave to intervene "as a party plaintiff" herein.

The reasons assigned for this extraordinary request are unique. They are that The Struthers Furnace Company was adjudicated a bankrupt on April 18, 1927; that

"this applicant" was appointed trustee in bankruptcy on July 10, 1929; that a cause of action exists in *either* the petitioner herein (Hugh W. Grant, as *receiver* of The Struthers Furnace Company), *or* this trustee, for the benefit of creditors and stockholders; that (nevertheless!) the rights, obligations and duties of the aforesaid petitioner and trustee "are *identical* for the purposes of this suit"; that the "intervention of your applicant as a party plaintiff in this suit will avoid a multiplicity of suits, *and will obviate the necessity of instituting an original action in the event that it should be held that the state court receiver had no authority to institute this action* (!); that, strangely enough, "your applicant" believes that the *receiver* has a meritorious cause of action, and that "the conduct of the company was unlawful and fraudulent as to the creditors and stockholders of the company." (Page 2.)

Of course, the motion must be denied. Before stating our reasons, permit us first to state:

SOME ESSENTIAL FACTS.

The petitioner herein (Hugh W. Grant, as *receiver* of The Struthers Furnace Company) owes his appointment to the Court of Common Pleas of Mahoning County, Ohio. (Tr. 251, 259.) He was so appointed in *two* suits. As shown in our briefs heretofore filed, the court was without jurisdiction to make the appointment in the *Baldwin suit,* for the reason that it was a suit by a stockholder solely for the appointment of a receiver.

The other suit was a suit by a trustee to foreclose a mortgage or deed of trust executed by The Struthers Furnace Company to secure certain bonds. This mortgage or deed of trust covered only the *specific prop-*

erty therein mentioned. *The claim here asserted by the petitioner against Leach & Co. was not covered by the said mortgage or deed of trust, neither was the other property of The Struthers Furnace Company.*

As shown in our briefs heretofore filed:

1. The State Court was without jurisdiction to appoint Grant receiver—at least of property not covered by the mortgage or deed of trust.

2. The State Court was without jurisdiction to authorize Grant, as receiver, to institute the suit herein against A. B. Leach & Co., Inc.

The sole question presented to this Court was whether Grant, as receiver, had authority to maintain this suit. In other words, *did he own, or was he authorized to represent, the alleged claim against A. B. Leach & Co., Inc?*

Grant was appointed receiver, first on January 20, and again on January 22, 1925. (Tr. 259, 251.) Suit was instituted by the aforesaid receiver in the District Court of the United States for the Northern District of Ohio, Eastern Division, against Leach & Co. on *August 5, 1925.* (Tr. 2.) After a hearing on the merits final decree was entered by that court in favor of the receiver on *March 18, 1926.* (Tr. 214.) On *July 11, 1928,* the Circuit Court of Appeals for the Seventh Circuit reversed the decree of the District Court on the ground that Grant, as receiver, had no authority to maintain this suit. (Tr. 270.) Subsequently this Court granted the receiver's petition for certiorari, and the cause was argued on April 11, 1929.

While it is true that Hugh W. Grant was not appointed

trustee in bankruptcy until July 10, 1929, this was due to the facts that on *April 23, 1927,* Hugh W. Grant, as *receiver,* procured the vacation of the order adjudicating The Struthers Furnace Company a bankrupt, and that this order of vacation was not reversed by the Circuit Court of Appeals until *February 15, 1929.* (*Struthers Furnace Co.* v. *Grant,* 30 Fed. (2d) 576.)

SUMMARY OF ARGUMENT.

1. Grant, as *receiver,* either has, or has not, authority to maintain this suit. If he has *not,* then there is no occasion to consider the motion of Grant, as *trustee,* to *intervene.*

2. If Grant, as *receiver,* has authority to maintain this suit, then there is no occasion for the intervention of Grant, as *trustee.* Grant's intervention is antagonistic and not "in subordination to, and in recognition of, the propriety of the main proceeding," as required by Equity Rule 37.

3. Grant, as *trustee,* was not a party to the suit in either of the courts below; and his proposed intervention is contrary not only to Equity Rule 37, but to the Constitution and the uniform practice of this Court.

ARGUMENT.

I.

Grant, as receiver, either has, or has not, authority to maintain this suit. If, as we contend, he has not, then there is no occasion to consider the motion of Grant, as trustee.

United Copper Securities Co. v. *Amalgamated Copper Co.*, 244 U. S. 261.
Railway Company v. *Twombly*, 100 U. S. 78, 81.

This is true for obvious reasons. Equity rule 37 provides that any "intervention shall be in *subordination* to, and in recognition of, the propriety of the main proceeding." If Grant, as *receiver*, has no power to maintain this suit, then it must be dismissed. And if that is done, the main proceeding will be at an end. There will then be no proceeding pending in which intervention is possible.

In the second place, this Court's jurisdiction of this controversy is exclusively *appellate*, not original. The sole question before this Court is whether the Circuit Court of Appeals erred in holding that Grant, as *receiver*, is without authority to maintain this suit. No new issues can be joined or tried here. If Grant, as *trustee*, owns, or is authorized to represent, the claim asserted here by Grant, as *receiver*, against Leach & Co., then Grant, as *trustee*, must assert it in a *nisi prius* court.

Grant, as *receiver*, and Grant, as *trustee*, are different

juristic persons, even if it be assumed, in the absence of proof, that the same human being is acting in the two different capacities. Leach & Co., Inc., is entitled to its day in court. It is entitled to know what claim Grant, as *trustee,* has against it; to file an answer; to require that Grant first make proof; to adduce evidence in its own behalf, and to be heard through its counsel. In

United States v. *Innerarity*, 19 Wall. 595, 22 L. ed. 202 this Court said:

> "The attempt to set up a claim under this petition or a supplemental petition by Innerarity's heirs in favor of the heirs of John Watkins, cannot be sustained. It does not appear that Watkins derived title from Innerarity, *or that Innerarity ever had any title.* The case is simply this: *Innerarity's heirs have filed their petition in time, but have no title.* Watkin's heirs have a title, but have not filed a petition for its allowance. *Watkin's title cannot be interposed by the present petitioners. Such practice is unknown. If a suit be commenced by A. to recover land or money, he failing on the merits, cannot bring into his suit a new plaintiff, especially one whose action, if then commenced, would be barred by the statute of limitations. If otherwise, the same suit can be continued indefinitely, constantly making new plaintiffs, until some one shall be found who has a meritorius claim.* It would be a practical abrogation of the limitation of the statute. The act of 1867 has been further extended, and the heirs of Watkins must make an original application in their own names. We understand the case of *United States* v. *Patterson* to be a decisive authority against the present claim."

See also:

Vannier v. *Aanti-Saloon League*, 238 N. Y. 457, 144 N. E. 679.

II.

If Grant, as receiver, has authority to maintain this suit, then there is no occasion for the intervention of Grant, as trustee. The only purpose of the intervention of Grant, as trustee, is to assert that he, and not Grant, as receiver, owns or is authorized to represent the alleged cause of action sought to be enforced against Leach & Co., Inc. BOTH of them cannot own it, neither can BOTH of them be plaintiffs, either jointly or alternately. It is either one or the other, or neither. It follows, therefore, that the proposed intervention of Grant, as trustee, is not "in subordination to, and in recognition of, the propriety of the main proceeding," as required by Equity Rule 37.

Hill v. *Wilson*, 210 Fed. 200

First Trust Co. v. *Illinois Cent. R. Co.*, 252 Fed. 965, certiorari denied 39 S. Ct. 390, 249 U. S. 615, 63 L. ed. 803.

Hopkins v. *Lancaster*, 254 Fed. 190.

Cauffiel v. *Lawrence*, 256 Fed. 714.

Schell v. *Leander Clark College*, 10 Fed. (2d.) 542.

Brictson Mfg. Co. v. *Woodrough*, 284 Fed. 484.

III.

Grant, as trustee, was not a party to the suit in either of the courts below; and his proposed intervention is contrary not only to Equity Rule 37, but to the Constitution and the uniform practice of this Court.

The United States v. *Patterson*, 15 How. 10, 14 L. ed. 578.

In *re Chewaucan River,* 89 Ore. 659, 171 Pac. 402:

> "The Supreme Court is a court of appellate jurisdiction only, and cannot admit interveners who were strangers to the proceeding below, as that would be an exercise of original jurisdiction."

Wenborne-Karpen Dryer Co. v. *Cutler Dry Kiln Co.,* (C. C. A. 2nd Cir.), 292 Fed. 861, certiorari denied, 44 Sup. Ct. 36, 263 U. S. 708.

Marsh v. *Nichols,* 120 U. S. 598, 7 Sup. Ct. 704, 30 L. ed. 796.

The William Bagley, 5 Wall. 377, 412 18 L. ed. 583.

People's Mutual Life Ins. Co. v. *Fagan,* 143 Ark. 78, 219 S. W. 738:

> "Where the legal representative of an insured brought an action on a life policy, when the action should have been brought by the representative of the beneficiary, who predeceased the insured, and a judgment was rendered in favor of the plaintiff, on appeal the Supreme Court had no jurisdiction to substitute the legal representative of the beneficiary as a party plaintiff."

Harrison et al. v. *Nixon,* 9 Pet. 483, 527.

Succession of Herdman, (La.), 97 So. 664.

Bryson v. *Great Northern Ry. Co.* (Mont.) 203, Pac. 529, 532.

Blatchford v. *Newberry,* 100 Ill. 484, 492-3.

In

United States v. *Patterson,* 15 How. 10, *supra,*

this Court said:

> "In this cause, as well as in that of the United States v. Samuel Davenport's Heirs, a motion was submitted on behalf of the heirs of Joseph Piernas alleging that a deed from Joseph Piernas to Victor Portia, dated the 30th August, 1804, being a link in the title to the Ormegas grant, was not sufficiently proven, and suggesting that it was not a genuine

deed, *and praying for leave to intervene in this suit to sustain their rights to this property.*

"The court is of opinion that the motion cannot be allowed. The plaintiff commenced his proceedings to assert his own claims against the United States. Those proceedings can neither benefit nor injure the persons interested in this motion, for they are not parties to the cause. The period for the assertion of a claim under the act of Congress of 17th June, 1844, has expired. Neither in the District Court nor in this court would it be lawful for persons, who failed to avail themselves of the benefit of that act during its operation, to intervene for the purpose of establishing a right under grants like these, after its expiration, in a suit commenced by other persons.

"In looking through the record, we find no fact to authorize the belief that the heirs of Piernas have any title to the lands embraced in these grants. If, therefore, it was compatible with the constitution and practice of this Court, for a person to intervene here in a litigation, to which he was no party in the court of original jurisdiction, we find nothing to authorize it in the present instance."

The time for the filing of a petition for certiorari in behalf of Grant as *trustee*, has also expired, even if one might be filed in behalf of a (juristic) person who was not a party in either of the lower courts.

It follows, therefore, that the anomalous motion herein must be denied.

Respectfully submitted,

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